competitive justifications for using marketing agreements. *Id.* at 25a. The Eleventh Circuit found the evidence "undisputed" that marketing agreements provide competitive benefits. *Id.* The Eleventh Circuit also noted that the jury may have been swayed by more than the actual evidence presented, namely, by petitioners' appeal to the historical independence of cattle farmers. *Id.* The court of appeals concluded that cattle producers like petitioners are entitled to their preference for selling cattle only on the cash market, but are not entitled to force that preference on other producers or packers who wish to find innovative and efficient methods of buying and selling cattle. *Id.* at 27a.

On August 19, 2005, three days after issuing its opinion on the merits of petitioners' appeal, the Eleventh Circuit decided petitioners' companion appeal of the district court's order assessing costs against petitioners. Opp. App. 1a-4a. In their costs appeal, petitioners argued that Tyson was not a "prevailing party" entitled to costs and, even if it were, the district court abused its discretion in awarding costs to Tyson because the legal claims raised in the case were unsettled and the courts' rulings on Tyson's motion for judgment were close calls. *Id.* at 2a-3a. The Eleventh Circuit rejected both of these arguments. *Id.* at 3a-4a. First, it concluded that Tyson was the "prevailing party" because petitioners "lost every aspect of the case and Tyson prevailed on it." *Id.* at 3a. Second, in holding that the district court did not abuse its discretion in awarding costs, it found: "[T]his case was not a close and difficult one.... The legal issues were not particularly novel or difficult.... [and] the case was not especially complicated." *Id.* at 4a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals conflicts with no decision of any other court of appeals and otherwise involves little more than the factbound determination that petitioners failed to prove their case, which is plainly unworthy of this

Court's review. Moreover, petitioners attempt to present an issue that they never presented to the court of appeals and, not surprisingly, the court of appeals did not decide. Thus, certiorari plainly should be denied.

I. THE ELEVENTH CIRCUIT HAS NOT ABANDONED THE RULE OF REASON AND PETITIONERS HAVE WAIVED ANY ARGUMENT TO THE CONTRARY.

Petitioners claim that this Court's review is warranted because the Eleventh Circuit has abandoned the "rule of reason" analysis applied under various antitrust statutes and has thereby departed from the law of this Court and every other court of appeals. See Pet. 7-11. Petitioners summarize their allegation that the Eleventh Circuit is the "lone outlier" in applying the rule of reason as follows: "[e]very other circuit readily accepts that an analysis under the rule of reason requires the court to balance the procompetitive benefits of a challenged practice against the anticompetitive harm caused by the practice." *Id.* at 9.

Petitioners' argument has been waived and in any event there is no holding below that abandons the rule of reason.

First, petitioners have waived their argument that the Eleventh Circuit has "abandoned" the rule of reason in this case. Petitioners did not present this argument to the court of appeals. To the contrary, petitioners' brief before the Eleventh Circuit argued that the trial court erred by applying a rule of reason analysis to their PSA claims. See Opp. App. 10a-12a. In the alternative, petitioners asserted to the court of appeals that its precedents applying the rule of reason are in harmony with those of the other federal circuits in requiring a balancing of the procompetitive benefits and anticompetitive harm of a challenged practice. See *id.* at 12a-16a (stating that, under Eleventh Circuit law, "[i]t is also evident that a weighing of the anti-competitive and pro-competitive benefits should take place.") (citing *Consultants & Designers, Inc.* v.

Butler Serv. Group, 720 F.2d 1553, 1562 (11th Cir. 1983) and *Graphic Prods. Distribs.* v. *ITEK Corp.*, 717 F.2d 1560, 1573 & n.24 (11th Cir. 1983)).

Under the doctrine of waiver, petitioners cannot assert an argument in this Court that they failed to raise previously, and indeed, is directly contrary to the argument raised below. See, *e.g.*, *Cooper Indus., Inc.* v. *Avaiall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("'We ordinarily do not decide in the first instance issues not decided below.'") (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam)); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below ...."); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

Second, petitioners' assertion to the Eleventh Circuit that its law is in harmony with the other federal circuits is correct. Contrary to petitioners' argument before this Court, the Eleventh Circuit plainly has not abandoned the concept that the rule of reason involves a weighing of the relative anticompetitive harms and procompetitive benefits of the conduct in question. See, *e.g.*, *Consultants & Designers, Inc.* v. *Butler Serv. Group*, 720 F.2d 1553, 1562 (11th Cir. 1983); *Graphic Prods. Distribs.* v. *ITEK Corp.*, 717 F.2d 1560, 1573 & n.24 (11th Cir. 1982); *All Care Nursing Serv., Inc.* v. *High Tech Staffing Servs., Inc.*, 135 F.3d 740, 749 (11th Cir. 1998) ("The rule of reason requires 'the factfinder [to weigh] all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'") (alteration in original); *DeLong Equip. Co.* v. *Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 (1989) (same). In fact, the district court specifically instructed the jury to conduct the weighing of harms and benefits that petitioners demand. See Pet. App. 48a ("If the beneficial effects on competition [of marketing agreements]

outweigh the harmful effects on competition, or if the net effect on competition is only slight or insubstantial, you may find that IBP's conduct has competitive benefits.").

Moreover, petitioners' arguments to this Court contain an inherent inconsistency that renders the case an unsuitable vehicle for review. As noted below, the petition asserts that, under the PSA, petitioners are not required to prove that the conduct in question caused any anticompetitive harm. See Pet. 15-19. However, petitioners also argue that the Eleventh Circuit has departed from the established course of the law in failing to *require* the district court to undertake a balancing of anticompetitive harm and procompetitive benefits in this case. See *id.* at 7-11. They cannot have it both ways.

II. THE CIRCUITS ARE NOT DIVIDED ON THE STANDARDS GOVERNING PETITIONERS' PSA CLAIM.

Likewise, petitioners are incorrect in asserting that there is a "longstanding" split among the courts of appeals concerning whether section 202(a) of the PSA requires proof of an injury or likelihood of injury that is competitive in nature. See Pet. 12. Petitioners contend that the Seventh and Eleventh Circuits require plaintiffs who bring a claim under section 202(a) to prove an actual or likely harm to competition, but that the Ninth and Tenth Circuits do not require such a showing. This purported split is illusory. In asserting that the courts of appeals are divided, petitioners fail to address all of the relevant cases and also fail to distinguish the separate claims available under section 202(a) and the separate subsections of the PSA.

In the decision below, the Eleventh Circuit stated that a claimant alleging that conduct is "unfair" under section 202(a) of the PSA must show an "adverse effect on competition." Pet. App. 12a. The Eleventh Circuit recently reached the same conclusion in *London* v. *Fieldale Farms, Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005). In *London*, the

court of appeals stated "in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." *Id.* This Court recently denied the petition in *London*. 126 S. Ct. 752 (2005)

This holding is in harmony with the decisions of the other federal circuits that have addressed the application of the "unfairness" claim provided in section 202(a):

Fourth Circuit: The Fourth Circuit has not yet issued a published opinion on the question whether section 202(a) requires a showing of actual or likely competitive injury. However, that court has addressed that exact question and concluded that competitive injury is required in an unpublished disposition. *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (unpublished table decision), *available at* 1998 WL 709324, at *4. District courts within the Fourth Circuit have uniformly reached that same conclusion in published opinions. See *Philson* v. *Cold Creek Farms*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating that section 202(a) prohibits "only those unfair, discriminatory or deceptive practices adversely affecting competition"); *Griffin* v. *Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (same).

Seventh Circuit: The Seventh Circuit has likewise held that section 202(a) requires a showing of competitive injury. In *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968), the court of appeals held that the defendant's conduct did not violate section 202(a) "absent some predatory intent or some likelihood of competitive injury." See also *id.* at 720. Petitioners assert that this ruling "ran counter to that court's own established interpretation of the PSA in *Wilson & Co.* v. *Benson*, 286 F.2d 891 (7th Cir. 1961)." Pet. 12. However, petitioners fail to acknowledge that in *Armour & Co.* the Seventh Circuit explicitly considered its prior holding in *Wilson & Co.* and reconciled the two cases. See *Armour & Co.*, 402 F.2d at 718 (explaining that the record in *Wilson &*

Co. "amply supported" the agency's finding that the challenged conduct was undertaken with the intent and actual effect of injuring competition) (citing *Wilson & Co.*, 286 F.2d at 895).

Petitioners also fail to mention the Seventh Circuit's holding in *Swift & Co.* v. *United States*, 308 F.2d 849 (7th Cir. 1962). In that case, the court of appeals held that an "agreement between competitive buyers to split or share the purchase" of livestock violated section 202(a). *Id.* at 853. In reaching this conclusion, the court made a point of analyzing the evidence of injury to competition, stating that the "essential nature and the necessary result of this arrangement or practice was to eliminate competition." *Id.* The Seventh Circuit noted this statement in *Armour & Co.* and relied upon it in harmonizing the Seventh Circuit's cases to require a showing of likelihood of injury to competition (or predatory intent) in cases brought under section 202(a). See 402 F.2d at 718.

Eighth Circuit: Petitioners incorrectly assert that the Eight Circuit has not addressed the question whether section 202(a) requires a showing of actual or likely competitive injury. See Pet. 13. In fact, in *IBP, inc.* v. *Glickman*, 187 F.3d 974, 977 (8th Cir. 1999), the Eighth Circuit addressed whether marketing agreements similar to those at issue in this case violated section 202(a). The court of appeals concluded that the challenged conduct was not an "unfair practice" under section 202(a) because it did not actually reduce competition or have the potential for reducing competition. See *id.* at 977.

Petitioners acknowledge and attempt to compare several other Eighth Circuit cases that are not on point: *Farrow* v. *United States Department of Agriculture*, 760 F.2d 211 (8th 1985), and *Van Wyck* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978). Pet. 13. Both cases address section 312(a) of the PSA—not the section at issue here. Moreover, the *Van Wyck* court did not discuss whether a showing of competitive injury was required or whether the injury addressed in the case was

competitive in nature. And in *Farrow* the court of appeals stated that, even under section 312(a), a practice can be declared to be "unfair" only "if it injures or is likely to injure competition." 760 F.2d at 214.

Ninth Circuit: According to petitioners, the conclusion that section 202(a) requires a showing of anticompetitive harm has been "rejected" by the Ninth and Tenth Circuits "as contrary to the PSA." Pet. 13. Petitioners cite *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451 (9th Cir. 1988), as support. Pet. 13. However, that case is inapposite. Rather than stating a claim under section 202(a), *Spencer* involved a claim under section 312(a) of the PSA, see 841 F.2d at 1453, which regulates the activities of stockyard owners, market agencies and dealers in the buying or selling of livestock. 7 U.S.C. § 213(a). Moreover, the plaintiff in *Spencer* asserted that the defendant had violated the PSA by engaging in a "deceptive practice." See 841 F. 2d at 1455. The Ninth Circuit held that this claim could be established "where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors." *Id.* Plainly, a claim of active deception on the part of a PSA defendant might be held to a different standard of proof than a claim that a practice is simply "unfair." But as the Eleventh Circuit noted, there is no claim of "deception" in this case. See *supra* at 1. Accordingly, because *Spencer* addressed a different section of the PSA and a legal theory not present here, the Ninth Circuit's decision in *Spencer* in no way conflicts with the opinion below.

Petitioners also cite *Blackfoot Livestock Commission, Co.* v. *Department of Agriculture*, 810 F.2d 916 (9th Cir. 1987) and *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971), to support their allegation of a circuit split. See Pet. 13. Like *Spencer*, *Blackfoot* involved section 312(a) of the PSA, not section 202(a). Moreover, in *Blackfoot* the court of appeals did not discuss whether any portion of the PSA requires a showing of competitive injury.

Sebastopol, in contrast, involved a claim under the same provision of the PSA as the instant case, section 202(a) (7 U.S.C. § 192(a)). However, in *Sebastol* the court of appeals did not address the question whether section 202(a) requires a showing of competitive harm. In fact, the "only issue" before the court was whether a cease and desist order issued by the Secretary of Agriculture could run against the owner of a company as an individual under an alter ego theory of liability. 440 F.2d at 983.

Petitioners' analysis of Ninth Circuit precedent omits an important and directly relevant case: *De Jong Packing Co.* v. *Department of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980). In *De Jong*, the court of appeals stated that a challenged practice is not "unfair" under section 202(a) unless the conduct actually reduces competition or has the potential for reducing competition. See *id.* at 1336-37 (stating that "unfair practices under § 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition").

De Jong is the Ninth Circuit's most recent decision interpreting section 202(a) and the only reported decision from the Ninth Circuit to address the same legal claim of "unfairness" as the instant case. In light of the holding in *De Jong*, petitioners' claim that the Ninth Circuit has "rejected" the Seventh Circuit's view that section 202(a) requires competitive harm, whether actual or likely, is simply wrong.

Tenth Circuit: Petitioners' assessment of Tenth Circuit case law is similarly deficient. Petitioners cite *Hays Livestock Commission Co.* v. *Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974) and *Peterman* v. *Department of Agriculture*, 770 F.2d 888 (10th Cir. 1985). Pet. 13. Neither case is on point. *Hays Livestock* involved a claim under section 208 of the PSA, not section 202(a), see 498 F.2d at 932, and did not address the requirement of competitive

injury under any provision of the PSA. Likewise, *Peterman* does not contain any discussion of whether section 202 requires a showing of competitive injury and it addressed a legal claim not present in this case. In *Peterman*, the Tenth Circuit upheld the Department of Agriculture's finding that Peterman's sales tactics, including a "bait and switch" scenario, constituted "deceptive trade practices" in violation of the PSA. 770 F.2d at 890. But, the court's opinion does not identify which provision of the PSA was at issue or address any required nexus to competition. Moreover, as noted above, *supra* at 1, the allegation of active deception—which was the only issue in *Peterman*—is not present in this case.

In contrast, the recent case of *Excel Corp.* v. *Department of Agriculture*, 397 F.3d 1285 (10th Cir. 2005), involved a claim under section 202 and addressed the issue of competitive injury. Petitioners cite *Excel* for the proposition that section 202(a) does not require a showing of wrongful intent, but rather focuses on the acts the defendant committed. Pet. 15-16. Petitioners fail to acknowledge the Tenth Circuit's related discussion regarding competitive harm. In *Excel*, the Department of Agriculture found that Excel violated section 202(a) and its implementing regulation by failing to disclose to hog producers a change in its formula for computing the weight of hog carcasses. 397 F.3d at 1287. The court of appeals concluded that there was substantial evidence to support the agency's finding. *Id.* at 1293. The court's analysis of whether Excel violated section 202(a) contains two conclusions particularly important for purposes of the present case. First, as petitioners assert, the court rejected the argument that section 202(a) requires a showing of wrongful intent. *Id.* at 1294. Second, as petitioners ignore, immediately before refusing to impose an intent requirement, the court of appeals rejected Excel's argument that its actions did not harm competition. *Id.* Focusing on the issue of competitive harm, the Tenth Circuit noted that the agency

"specifically concluded" that Excel's actions impeded competition and held that this conclusion was a reasonable inference from the evidence presented. *Id.* Accordingly, although the Tenth Circuit found that a showing of the defendant's wrongful intent was not required to prevail under section 202(a), it did so after addressing whether the challenged conduct caused competitive injury.

* * * *

In sum, petitioners' assertion that the courts of appeals are split—with the Seventh and Eleventh Circuits on one side, the Ninth and Tenth Circuits on the other side, and the Fourth and Eighth Circuits undecided—does not withstand scrutiny. Petitioners' analysis depends on cases that do not involve the same provision of the PSA nor the legal claims at issue here, and the petition fails to address cases that are directly on point. In fact, the courts of appeals are in harmony in concluding that claims of "unfair" conduct under section 202(a) require a showing of actual or likely anticompetitive effect.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW.

A. Petitioners Could Not Prevail Under Any Legal Standard.

The petition asserts that the district court and the Eleventh Circuit incorrectly applied Eleventh Circuit law governing the application of the rule of reason and the PSA. Pet. 7-21. But petitioners would not prevail even if this Court were to accept this case and ultimately rule for petitioners on the merits of these claims.

As noted above, in addition to concluding that petitioners failed to present sufficient evidence to demonstrate an injury to competition, the district court separately concluded that petitioners failed to present sufficient evidence to establish that the entire class was injured by Tyson's use of marketing agreements or the amount of any damages to the class. See

Pet. App. 34a-35a ("The Court finds that the evidence does not support a finding that each member of plaintiffs' class was injured."); *id.* at 35a-37a ("Defendant correctly points out that plaintiffs did not prove, at trial, the extent of class-wide damages or the volume of class members' sales on the cash market."). Accordingly, given the district court's holdings that petitioners failed to present sufficient evidence on other essential elements of their case, petitioners could not prevail regardless of the legal standard adopted by this Court on the issues presented in the petition.

B. Petitioners Failed To Present Sufficient Evidence For This Court To Meaningfully Address The Merits Of Their Claims.

As the opinions of the district court and court of appeals make clear, the evidentiary record in this case is sorely lacking. Petitioners failed to present sufficient evidence for this Court thoroughly to analyze the merits of the questions presented in the petition. For example, petitioners argue that the district court and court of appeals erred in failing to balance procompetitive justifications for Tyson's conduct against any anticompetitive effects caused by that conduct. Pet. 7-11. Aside from the fact that the district court *did* require such balancing, see *id.* at 23, Pet. App. 48a, a failure to balance procompetitive benefits and anticompetitive effects cannot matter in a case in which no anticompetitive effects were shown. Petitioners claim to have demonstrated an anticompetitive effect because they presented "expert" evidence concluding that Tyson's use of marketing agreements caused the price of fed cattle sold in the cash market to go down. Pet. 16-17. This argument simply assumes that any action which causes the price of goods to drop is *ipso facto* anticompetitive. Plaintiffs present no authority to support this assumption, which is simply unfounded. In sum, real proof of harm to competition in this case—with a showing that Tyson had the market power to cause anticompetitive effects in the relevant national

marketplace—was never made. Accordingly, as the opinions of the district court and court of appeals on the sufficiency of the evidence suggest, the factual record that would support this Court's review on the merits is lacking.

IV. THE DECISION BELOW IS CORRECT ON THE MERITS.

The courts of appeals, including the Eleventh Circuit in this case, are correct in holding that an "unfairness" claim under section 202(a) requires a showing of harm to competition. Pet App. 12a; see also *Philson*, 1998 WL 709324, at *4; *Armour & Co.*, 402 F.2d at 717; *IBP, inc.*, 187 F.3d at 977; *De Jong Packing Co.*, 618 F.2d at 1331. A jury finding that something is "unfair" does not necessarily mean it is illegal. In the context of the PSA, unfairness must be considered in relation to competition. "The primary purpose of the PSA was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.'" *London*, 410 F.3d at 1302 (quoting H.R. Rep. No. 85-1048, at 1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213). In other words, the PSA "was aimed at halting practices whose purpose was to destroy competition." Pet. App. 12a; see also *Mahon* v. *Stowers*, 416 U.S. 100, 106 (1974) (per curiam) ("[T]he 'chief evil' at which [the PSA] was aimed was 'the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys.'") (quoting *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922)). As a result, claims of unfair practices or price manipulation under the PSA, like those asserted by petitioners, require a showing of competitive harm. Pet. App. 12a.

Neither the text nor history of the PSA evidences a congressional intent "to interfere with a meat packer's business practices where those practices did not interfere with competition." Pet. App. 12a. The PSA was not intended to guarantee livestock producers success, nor did it mean to

interfere with the right of individuals to enter into pro-competitive contracts. See *IBP, inc.*, 187 F.3d at 977 ("We are ... mindful that the purpose behind the Act was not to so upset the traditional principles of freedom of contract, as to require an entirely level playing field for all.") (internal quotation marks omitted). Neither the cash market method of purchasing cattle nor the marketing agreements at issue in this case existed at the time the PSA was enacted and thus the Act could not have been intended to enshrine one of these purchasing methods in the law to the exclusion of the other. To the contrary, the Act is designed to encourage marketing innovations because, like other antitrust laws, "[t]he PSA was designed to promote efficiency, not frustrate it." *Jackson* v. *Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (9th Cir. 1995). Thus, "[i]f a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition." Pet. App. 13a.

Here, there was ample, undisputed evidence that "marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market." Pet. App. 20a. The Eleventh Circuit specifically noted that "[w]itnesses for both parties recognized that [marketing agreements have] pro-competitive benefits for the industry." *Id.* at 21a. Both the district court and the Eleventh Circuit analyzed in detail the evidence presented in support of Tyson's proffered pro-competitive justifications for marketing agreements, as well as petitioners' arguments that these benefits were pretextual. *Id.* at 14a-24a, 31a-34a. Both courts concluded that petitioners failed to present any evidence from which a reasonable jury could conclude that Tyson lacked competitive justifications for using marketing agreements. *Id.* at 25a, 31a. Petitioners' attempt to require the use of one historical method of purchasing cattle—to the exclusion of an innovative method with pro-competitive benefits that was initiated by cattle producers, not Tyson—

was properly rejected by the district court and the Eleventh Circuit. See *id.* at 25a. There is no basis for this Court to review this correct determination.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

NATHAN A. HODNE
TYSON FOODS, INC.
2210 West Oaklawn Drive
Springdale, AR 72762-6999
(479) 290-4706

CARTER G. PHILLIPS*
JAY T. JORGENSEN
CASSIDY KESLER PINEGAR
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent Tyson Fresh Meats, Inc.

February 21, 2006

* Counsel of Record

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-14534
Non-Argument Calendar

HENRY LEE "LEROY" PICKETT, MIKE CALLICRATE, PAT GOGGINS, JOHNNY SMITH, W.J. ROTHWELL RANCH COMPANY, CHRISTOPHER J. ABBOTT,
Plaintiffs-Appellants,

SAM BRITT, *et al.*,
Plaintiffs,

v.

IOWA BEEF PROCESSORS,
Defendant,

TYSON FRESH MEATS, INC.,
Defendant-Appellee.

Aug. 19, 2005.

Appeal from the United States District Court
for the Middle District of Alabama.
D.C. Docket No. 96-01103-CV-S-N.

Before CARNES and COX, *Circuit Judges*, and MILLS,* *District Judge*.

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

This is the companion appeal to *Pickett v. Tyson Fresh Meats, Inc.*, 04-12137, in which we affirmed the district court's judgment as a matter of law for Tyson Fresh Meats, Inc. in Henry Lee Pickett's class action lawsuit brought under the Packers and Stockyard Act of 1921.

In this opinion, we address Pickett's appeal from the district court's order assessing costs against him. After the district court granted Tyson's motion for judgment as a matter of law, Tyson filed its bill of costs pursuant to Fed.R.Civ.P. 54(d)(1). Pickett lodged both general objections to any costs being awarded to Tyson, and specific objections to individual items that Tyson claimed as reimbursable expenses. The district court overruled the general objections, sustained some of Pickett's specific item objections, overruled others, and ordered Pickett to pay $70,198.60 worth of costs to Tyson.

Pickett is not pursuing on appeal any of the specific objections he had to individual items in Tyson's bill of costs. Instead, he argues that Tyson, despite securing judgment as a matter of law in its favor, is not a "prevailing party" entitled to costs under Rule 54(d)(1), and that, even if it is, the district court abused its discretion in not rejecting Tyson's request for costs.

"'We review the factual findings underlying a district court's determination regarding prevailing party status for clear error. Whether the facts as found suffice to render the plaintiff a 'prevailing party' is a legal question reviewed *de novo*.'" *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1321 (11th Cir.2001) (quoting *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 1012 (11th Cir.2001)). We review a district court's decision about whether to award costs to the prevailing party for abuse of discretion. *Chapman v. AI Transp.*, 229 F.3d 1012, 1039 (11th Cir.2000) (en banc).

Rule 54(d)(1) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Fed.R.Civ.P. 54(d)(1). The parties agree that, other than Rule 54(d)(1), no other statute or rules apply to the costs in this case. Where their positions diverge is on the question of who is the "prevailing party."

A defendant is a prevailing party if the plaintiff achieves none of the benefits sought in bringing its lawsuit. "If the case is litigated to judgment on the merits in favor of the defendant, the defendant is the prevailing party." 10 *Moore's Federal Practice* § 54.171[3][c][iv], at 54-285 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419-20, 98 S.Ct. 694, 699-700, 54 L.Ed.2d 648 (1978)).

Pickett sought damages from and injunctive relief against Tyson for practices he claimed were in violation of the Packers and Stockyard Act. He did not obtain any of the relief he sought. While the jury's answers to the interrogatory questions on the special verdict form were in Pickett's favor, the district court did not enter judgment on that verdict, and we have affirmed its decision not to do so. Because Pickett lost every aspect of the case and Tyson prevailed on it, Tyson is the "prevailing party" for purposes of Rule 54(d)(1).

Pickett contends that even so, the district court abused its discretion under Rule 54(d)(1) by failing to reject Tyson's request for costs. He relies primarily on *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731-32 (6th Cir. 1986), arguing that where the case is a "close and difficult" one, the non-prevailing party litigated the case in good faith, and it has significantly less financial resources then the prevailing party, a district court should not award costs under Rule 54(d). Pickett is wrong for a number of reasons.

First, good faith and limited financial resources are not enough to overcome the strong presumption in favor of awarding costs to the prevailing party. The Sixth Circuit in *White & White* itself stated that "[g]ood faith without more . . . is an insufficient basis for denying costs to a prevailing party." *Id.* at 731. Our own en banc decision in *Chapman v. Al Transportation* held that a district court should not consider the relative wealth of the parties in deciding whether to reject prevailing-party costs. 229 F.3d at 1039.

Second, this case was not a close and difficult one. As our opinion in the appeal on the merits explains, witnesses for both parties agreed that Tyson had a number of competitive justifications for its allegedly unfair practices. The legal issues were not particularly novel or difficult. Although it took a long time to try, the case was not especially complicated. In that respect, it differs from the complicated antitrust lawsuit involved in *White & White*. *See id.* at 733.

As we explained in *Chapman*, a district court needs a "sound basis" to overcome the strong presumption that a prevailing party is entitled to costs. There was none in this case. The district court did not abuse its discretion in awarding costs to Tyson under Rule 54(b)(1).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 04-12137-D

HENRY LEE PICKETT, *et al.*,
Plaintiffs-Appellants,

vs.

TYSON FRESH MEATS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama, Northern Division
C.A. No. 96-A-1103-N
The Honorable Lyle E. Strom, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

JOE R. WHATLEY, JR.
PETER H. BURKE
ANDREW C. ALLEN
WHATLEY DRAKE, L.L.C.
2323 2nd Avenue North
Birmingham, AL 35203-4601
(205) 328-9576
DAVID DOMINA
NORA M. KANE
DOMINA LAW FIRM
2425 S. 144th Street
Omaha, NE 68154
(402) 493-4100

LARRY W. MORRIS
CLAY HORNSBY
MORRIS, HAYNES & HORNSBY
P.O. Box 1660
Alexander City, AL 35011
(256) 329-2000
RANDY BEARD
PIERCE J. HARRIS
BEARD & BEARD
P.O. Box 88
Guntersville, AL 35976
(250) 582-3189
STEPHEN K. GRIFFITH
KNIGHT, GRIFFITH, MCKENZIE,
KNIGHT, MCLEROY & LITTLE, LLP
P.O. Box 930
Cullman, AL 35056
(256) 734-0456

Attorneys for Plaintiffs-Appellants

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2. *The Trial Court Improperly Found that a Rule of Reason Analysis applied to Plaintiffs' Claims.*

In conjunction with the overall *Sherman Act* framework, Tyson also contended that a rule of reason analysis must be applied to its conduct. Plaintiffs objected to this contention in its pretrial filings (R12-626) and during the jury charge conference. Specifically, counsel for the Plaintiffs stated:

> And the whole—first of all, we don't think—and we've expressed this before. We don't think that the rule of reason has any place in the Packers and Stockyards Act analysis, that what you ought to give the jury is the language of the statute and not limit that through the rule of reason kind of instruction. And we object to the inclusion of the rule of reason analysis, period.
>
> If it is going to—secondarily, if it is going to be included, then number one, we think as discussed in the last full paragraph on page 2 of this section from Professor Areeda's treatise—and it's paragraph 1507b that I'm reading from, that I'm citing specifically—the way the analysis goes, once the plaintiff satisfies his burden of persuasion of the existence of a significant restraint, he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate business objective. The plaintiff may rebut this by introducing evidence that the objective is illegitimate or that the restraint is not reasonably necessary to achieve it. And then it goes on to discuss balancing the—weighing and balancing the harm against the benefit in the course of the analysis. (R40-3105:3-23)[22]

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[22] *See also*, (R40-3107:12-3108:8; R40-3112:1-11)

A "rule of reason" defense is not appropriate in a 7 U.S.C. § 192 Packers & Stockyards Act case. If the Defendant committed a violation of 7 U.S.C. § 192, it is liable for the damages it caused, even if it had a business reason for its conduct that was, for example, unfair. The statute is designed to codify and implement a national public policy that protection of the market for producers of meat-bearing animals is a greater public value than allowing packers to deal at the market place as they wish so long as they have a business reason to do so.

"[T]he Packers and Stockyards Act is remedial legislation and should be liberally construed to further its life and fully effectuate its public purpose." *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332, 1336 (8th Cir 1971). The *Act* also "is one of the most comprehensive regulatory measures ever enacted.[']" Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 1 The National Agricultural. Law Center (April 2003). "The Act was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce . . . ." H.R. 324, 67th Cong., 1st Sess. (1921); H.R. 77, 67th Cong., 1st Sess. (1921). *Id. Bruhns*, 438 F.2d at 1339.

The District Court relied upon dicta from *I.B.P. v. Glickman*, 187 F.3d 974 (8th Cir. 1999) to support its conclusion that Tyson's "reliable supply" justification is a complete defense. Such a reading clearly overstates the narrow holding of *Glickman*. In *Glickman*, the U.S.D.A. challenged agreements that provided IBP with the right of first refusal on cattle in a group of Kansas feedlots known collectively as the Beef Marketing Group ("BMG") *Id.* at 976. The U.S.D.A. argued to the judicial officer that the agreement (1) was an unreasonable preference, and (2) had the potential effect of harming competition. *Id.* The judicial officer found that the agreement did not provide an unreasonable preference, but that the

agreement did have the effect or the potential effect of reducing competition. *Id.* at 976-977.

On appeal, the Eighth Circuit found that there was no actual effect on competition. *Glickman*, 187 F.3d at 977. This finding was based primarily upon U.S.D.A.'s admission that no actual price reduction resulted for feedlots outside the agreement. *Id.* at 976 n.4. The basis for the decision was the lack of showing of either actual or potential harm to competition. Absent a finding of harm, the agency could not prevail. Any discussion of justification was superfluous.

Glickman is easily distinguished from this action. First, Plaintiffs did not pursue a preference claim at trial. Second, and more important, unlike in *Glickman*, the jury in this action found an actual effect on competition. Additionally, the jury was free to reject Tyson's claims of business justifications, which it did in answering special interrogatory #3, including the evidence relating to the reliable supply defense. The Eighth Circuit dicta did not bind this jury, or any other jury, to make findings of fact in Tyson's favor. The jury properly rejected Tyson's evidence and found for the Plaintiffs.

In sum, the trial court improperly found that a rule of reason defense applied to Plaintiffs' claims under the PSA.

3. *If the Rule of Reason does apply to Plaintiffs' PSA Claim, the Trial Court Erred in Applying its Rule of Reason Analysis.*

After convincing the court that a rule of reason analysis applied to Plaintiffs' PSA claim, Tyson further argued that under Eleventh Circuit precedent if a defendant can show that its business practices have any pro-competitive effect or justification then it cannot be held liable under a rule of reason analysis. Tyson also argued that Eleventh Circuit law was different from other circuits in this regard.

Plaintiffs objected to the proposed jury charge on this issue. (R40-3105:10-3106:3). Plaintiffs informed the court that if it did apply a rule of reason test to this action, then the court should allow the jury to weigh the alleged pro-competitive effects against the negative effects of Tyson's use of captive supply. Tyson again led the trial court into error on this point.[23]

Levine v. Central Florida Medical Affiliate, 72 F.3d 1538 (11th Cir. 1996), the principal case upon which Tyson relied, states that a rule of reason analysis requires a plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification. 72 F.3d at 1551 (*citing Consultants & Designers, Inc. v. Butler Serv. Group*, 720 F.2d 1553, 1562 (11th Cir. 1983))[24]

However, *Consultants & Designers, Inc. v. Butler Serv. Group*, the very case that *Levine* cites to and relies upon actually shows that a weighing of anti-competitive and pro-competitive effects is required under a rule of reason analysis. There, this Court stated:

> Under the rule of reason it is necessary to establish that the covenant had an adverse impact on competition. As this court said in *H & B Equipment Co. v. Interna-*

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[23] During the charge conference, counsel for Tyson acknowledged that the court's charge to the jury and special interrogatories were quite favorable to his client.

> THE COURT: Well, having heard the plaintiffs' objections, I'm not surprised by your response.
>
> MR. JORGENSEN: Yeah. They don't—*not all your instructions favor us.* We wish the law were different in some instances, *but they're very good.* (R40-3132:15-19) (emphasis added)

[24] Both *Maris Distributing Company*, 302 F.3d at 1213 and *Southern Card & Novelty Inc.*, 138 F.3d at 876, the other two cases upon which Tyson relied, cited to the above-referenced portion of *Levine*.

tional Harvester Co., 577 F.2d 239, 246 (5th Cir.1978): The first step in establishing an unreasonable restraint of trade is to show anticompetitive effect, either in intrabrand or interbrand markets. . . . Absent anticompetitive effect, an unlawful intent will not establish a rule of reason violation, *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242 [243], 62 L.Ed. 683 (1918), nor will the use of unfair methods of competition. Similarly, in *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S. Ct. 1218, 59 L.Ed.2d 457 (1979), we held:

> [T]he rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive *effect which is not offset by a need to achieve a procompetitive benefit or justification. The questions of whether Butler's enforcement of its covenant has any anticompetitive effect and whether this effect is outweighed by any procompetitive benefits are not really separate from one another. Our analysis will consequently treat these issues as a single problem to be analyzed and resolved as a unit.* An anticompetitive or procompetitive effect must be judged in relation to a market, for it is in that conceptual space that competition takes place.

720 F.2d at 1562 (emphasis added)

It is clear, therefore, that the very case *Levine* relies upon for the proposition that a plaintiff must show that a defendant's conduct has no pro-competitive effects does not in fact stand for that proposition. Instead, it demonstrates that a defendant must make some showing of a need or a justification for the restraint in terms of pro-competitive benefits. It is also evident that a weighing of the anti-competitive and procompetitive benefits should take place. Accordingly, the trial

court improperly applied the rule of reason analysis to Plaintiffs' PSA claim.

Other case law from the Eleventh Circuit also supports this type of analysis for a rule of reason inquiry. For example, in *Graphic Products Distributors v. ITEK Corp.*, 717 F.2d 1560 (11th Cir. 1983) the court described a rule of reason inquiry in the context of intrabrand and interbrand competition. It stated:

> Having crossed this threshold, GPD was required to take its "first step": "show [an] anticompetitive effect, either in the intrabrand or interbrand markets." *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir.1978). *We emphasize, however, that demonstrating an anticompetitive effect is but the first step of what must be a systematic comparison of the negative effects of the restraint on intrabrand competition and interbrand competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints.* This is the critical analysis required by *Sylvania*. *Muenster Butane*, 651 F.2d at 296. *Accord Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F.Supp. 750, 760 (D.Md.1980), *aff'd*, 638 F.2d 15 (4th Cir.1981). 717 F.2d at 1571 (emphasis added).
>
> * * * * *
>
> To require an antitrust plaintiff to conjure up every possible pro-competitive rationale for a vertical restraint, and prove their inapplicability to the restraint in question, would be to impose an insurmountable burden. It would, in effect, convert the rule of *Sylvania*—that pro-competitive interbrand effects of vertical restraints must be considered—into a rule of per se legality for intra-brand restraints. *Sylvania* clearly does not extend that far, and we decline to so extend it on the facts of the case before us. 717 F.2d at 1573.

* * * * *

> Of course, *Itek was free to come forward with a showing that, notwithstanding its market power, the vertical restraints were reasonably necessary to achieve legitimate, pro-competitive purposes, and that the purpose and effect of the restraints were pro-competitive when viewed as a whole.* We now apply this analytical framework to the present case by analyzing first the effect of the intrabrand restraints on consumer welfare, in light of the interbrand market structure. We then analyze any possible pro-competitive effects on interbrand competition. 717 F.2d at 1573. (emphasis added)

* * * * *

> This allocation of burdens is consistent with our holding in *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S. Ct. 1218, 59 L.Ed.2d 457 1979), *that "the rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a pro-competitive benefit or justification.*" (citations omitted). 717 F.2d at 1573 n.24 (emphasis added).

It is evident, therefore, that the court applied an improper rule of reason standard to Tyson's conduct in this action. If the court had applied the correct standard, as Plaintiffs requested, it would have been required to weigh the alleged competitive justifications of Tyson's conduct against the harm that its use of captive supply had caused. Such a weighing, in light of the jury's finding regarding pretext, would have required the court to deny Tyson's Rule 50 motion.

As the trial court's finding regarding Rule 50 is entitled to no deference, and this Court applies the same standard *de novo*, this Court should vacate the court's order and render judgment for the Plaintiffs on this additional basis.

* * * *

No. 05-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners,

v.

TYSON FRESH MEATS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

DAVID DOMINA
MICHAEL STUMO
DOMINA LAW FIRM
2425 S. 144th Street
Omaha, NE 68144
(402) 493-4100

RANDY BEARD
PIERCE J. HARRIS
BEARD & BEARD
P. O. Box 88
Guntersville, AL 35976
(256) 582-3189

STEPHEN K. GRIFFITH
KNIGHT, GRIFFITH, MCKENZIE,
KNIGHT, MCLEROY & LITTLE, LLP
P. O. Box 930
Cullman, AL 35056
(256) 734-0456

JOE R. WHATLEY, JR.*
ANDREW C. ALLEN
PETER H. BURKE
ADAM P. PLANT
WHATLEY DRAKE, LLC
2323 Second Avenue North
Birmingham, AL 35203
(205) 328-9576

LARRY W. MORRIS
CLAY HORNSBY
MORRIS, HAYNES & HORNSBY
P. O. Box 1660
Alexander City, AL 35011
(256) 329-2000

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

First. Whether the rule of reason analysis, and its requirements of (1) a detailed analysis of any anticompetitive business practice within an industry and (2) weighing the anticompetitive practice against any procompetitive benefit derived from that practice, remains valid or, as the Eleventh Circuit—the lone outlier on this question—determined, the rule of reason may be replaced with an inverted quick look analysis that approves anticompetitive practices so long as *any* procompetitive benefit derives from an anticompetitive practice.

Second. Whether, as an issue of first impression that will resolve a deepening split among the circuits, a private plaintiff suing under section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192, must show that a challenged practice has an adverse effect on competition or—consistent with the language of the statute—only that the practice was unfair, intended to manipulate or control prices, or has the effect of manipulating or controlling prices.

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REPLY BRIEF FOR THE PETITIONERS

Contrary to the assertions of Tyson Fresh Meats, Inc. in its brief in opposition, this case is very much worthy of certiorari review. In addition to the reasons Pickett stated in the petition, two other points show why this Court should grant review. First, Tyson conceded at trial the clear split of authority that the first question presented would resolve, and Tyson's waiver argument is flat wrong. Second, a report by the United States Department of Agriculture released shortly after the petition was filed confirms the importance of the second question presented regarding the Packers and Stockyards Act (PSA). 7 U.S.C. § 181, *et seq*. The narrow questions presented by the petition would allow the Court to resolve important splits of authority among the courts of appeals.

First. The Court's review is warranted because, in the words of Tyson's counsel during the jury charge conference:

> I would just submit, Your Honor, that it would be an error for you to give any other instruction than the one you're giving. I've read the Areeda Treatise, not just the section you've been given, but the whole thing; and it is not followed in the Eleventh Circuit. *The Eleventh Circuit has been very clear in what the burden is in the Eleventh Circuit. It's been very clear that it's different from the other circuits. And I've got the citations.*
>
> . . .
>
> . . . If I could just read the snippet, quote, Rule of reason analysis requires the plaintiff to prove, number one, an anticompetitive effect of the defendant's conduct on the relevant market and, number two that *the conduct has no procompetitive benefit or justification*, which is exactly how you framed it, Your Honor.

Reply App. at 4a-5a (emphasis added). It is not clear from the brief in opposition exactly what happened to the citations on which Tyson relied, but it is clear that Tyson has not done justice to the record of this case.

Given the position Tyson advocated throughout this case, it is stunning that Tyson would now assert that the "lopsided conflict in the federal circuits" regarding the rule of reason is "not real." Opp. at 2. Throughout the life of this case, Tyson's counsel has consistently stated that, under *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996), and recent Eleventh Circuit precedent, the burden of proof regarding "the anticompetitive effects of the defendant's conduct, as the Eleventh Circuit says, on the relevant market and no procompetitive benefit or justification, the burden of both of those points, both of those elements, is on the plaintiff, as the Eleventh Circuit has made clear." Reply App. at 5a. Before the district court, Tyson confirmed that the clear split of authority Pickett's first question presents

is indeed cert-worthy: Tyson's counsel "frank[ly]" told the trial judge that it was both "interesting[]" and "important[]" that "in the rule of reason analysis . . . *other circuits have used the balancing. The Eleventh Circuit has not.*" *Id.* at 6a (emphasis added). Rather than conceding the cert-worthiness of the first question presented, Tyson has crafted an amnesiac argument that hopes to obscure this clear split of authority. At best, Tyson's argument is mistaken regarding the record; at worst, Tyson's argument is deliberately misleading. Under either reading, Tyson's argument is just plain wrong.

Tyson's further assertion that Pickett waived his argument regarding the rule of reason jurisprudence of the Eleventh Circuit is similarly baseless. Pickett never wavered from his position that, if the rule of reason applied at all in PSA cases, Eleventh Circuit precedent should recognize that, under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 97 S. Ct. 2549, 2557 (1977); Reply App. at 1a-2a. Before the district court, Pickett stated clearly that "under a rule of reason analysis a fact finder should weigh the anti-competitive and any pro-competitive benefits of a restraint in order to determine" whether the use of captive supply violated the PSA. R12-646-1 to -2. Tyson, by contrast, argued for a jury charge based on *Levine*'s erroneous formulation of the rule of reason, Reply App. at 4a; received its desired instruction, Pet. App. at 46a-47a; and persuaded the district court to use that erroneous test in its opinion granting judgment as a matter of law, Pet. App. at 30a-31a. The trial judge himself acknowledged that Pickett had made an adequate record for appeal. Reply App. at 7a.

Before the court of appeals, Pickett argued that the district court erred when it relied on *Levine*, the case that created the inverted quick look test used by the Eleventh Circuit. Opp. App. at 12a-16a. There, Pickett argued—as he has at every

level—that pre-*Levine* caselaw in the Eleventh and the Old Fifth Circuits followed the jurisprudence of this Court and was in harmony with the other courts of appeals. *See, e.g., Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1562 (11th Cir. 1983); *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983) ("To require an antitrust plaintiff to conjure up every possible pro-competitive rationale . . . , and prove their inapplicability to the restraint in question, would be to impose an insurmountable burden."); *H&B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978). Pickett has consistently maintained that the burden the *Levine* test imposes on antitrust plaintiffs is both virtually insurmountable and conflicts directly with accepted precedent.

Pickett also petitioned for rehearing en banc regarding whether—in the light of contrary prior precedent from this Court, the Old Fifth Circuit, and the Eleventh Circuit—the court of appeals could use the inverted quick look analysis employed by both the panel and the district court. *See* Pet. for Reh'g En Banc at ii, 18-20, *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005) (petition for rehearing en banc denied Oct. 7, 2005). Unfortunately, Pickett's petition for rehearing en banc fell on deaf ears. In this case, the Eleventh Circuit reaffirmed its decade-long adherence to the inverted quick look test of *Levine* and solidified the circuit split that this Court should address.

Now that the Court has been given a clear presentation of both (1) the parties' unanimity regarding the circuit split caused by the Eleventh Circuit in rule of reason cases and (2) the meticulous record Pickett has built on this issue, it is helpful to understand how the split occurred. In *Levine*, the Eleventh Circuit wrote that the "[r]ule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that

the conduct has no procompetitive benefit or justification. *E.g., Consultants & Designers*, 720 F.2d at 1562." *Levine*, 72 F.3d at 1551.

Contrary to the statement of the *Levine* court, however, *Consultants & Designers* was faithful to this Court's rule of reason jurisprudence. In that case, the Eleventh Circuit recognized that the rule of reason required a balancing of procompetitive benefits against anticompetitive harms:

> The rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification.

Consultants & Designers, 720 F.2d at 1562 (quoting *Kestenbaum*, 575 F.2d at 571, and citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 243 (1918); *H&B Equipment*, 577 F.2d at 246) (internal alteration removed). The other pre-*Levine* caselaw Tyson cites in its brief in opposition also was faithful to the accepted formulation of the rule of reason. Opp. at 8-9 (citing *Graphic Prods.*, 717 F.2d at 1573). *Levine*, however, was absolutely unfaithful to the prior precedent of this Court, the court of appeals, and its predecessor circuit, and the *Levine* test conflicts with the jurisprudence of every other federal circuit.

Despite the clear split of authority on this issue, the Eleventh Circuit has adhered to the inverted quick look test of *Levine* on several occasions. Both *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 876 (11th Cir. 1998), and *Maris Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002), based their erroneous formulations of the rule of reason on *Levine*. *See, e.g.*, Reply App. at 4a-5a. The Eleventh Circuit has declined to conform to the precedents of this Court, the Old Fifth Circuit, and its own correct, pre-*Levine* decisions. Rather than recon-

ciling its inverted quick look test to the mountain of precedent against it, the Eleventh Circuit has held to its erroneous test and made no attempt to distinguish the clear statements of law contrary to its position.

The record shows that both the district court and the court of appeals disregarded Pickett's clear and consistent arguments regarding the rule of reason. The Eleventh Circuit, loath to abandon the inverted quick look analysis, stayed faithful to the test it created in *Levine* and contravened the precedent of this Court and the other courts of appeals. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 n.16, 102 S. Ct. 2466, 2473 n.16 (1982) (anticompetitive harms "*must be balanced against*" procompetitive benefits) (quoting *Continental T.V.*, 433 U.S. at 50 n.16, 97 S. Ct., at 2557 n.16) (emphasis added). *See also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 n.15, 119 S. Ct. 1604, 1618 n.15 (1999) (citing Kolasky, *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, Antitrust 41, 43 (Spring 1998) ("[I]n applying the rule of reason, the courts, *as with any balancing test*, use a sliding scale to determine how much proof to require") (emphasis added)). The court of appeals nevertheless maintained that (1) Pickett must show that "marketing agreements have no pro-competitive justifications," Pet. App. at 11a; (2) Pickett could not prevail unless "there is evidence from which a jury reasonably could find that none of Tyson's asserted justifications are real, that each one is pretextual," *id.* at 14a; and (3) Pickett "did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements," *id.* at 25a.

Pickett and Tyson agree that "the Eleventh Circuit does not use the balancing test" and that the split of authority is clear, important, and very much real; as Tyson's counsel "frank[ly]" stated before the district court, "other circuits have used the